Supreme Court, U.S.
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In the

Supreme Court of the United States

FRANK COSTA,

Petitioner,

v.

JOHN R. McCULLOUGH, Superintendent, SCI HOUTZDALE; ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER TRIAL COUNSEL'S FAILURE TO OBJECT TO AN EXCESSIVE SENTENCE IMPOSED CONTRARY TO THE SENTENCING COURT'S EXPRESS INTENTION AND WITHOUT THE REQUIRED STATEMENT OF REASONS WAS DEFICIENT PERFORMANCE, AND ALONG WITH THE RESULTANT PREJUDICE, CONSTITUTED INEFFECTIVE ASSISTANCE?

II. SHOULD THE CUMULATIVE EFFECT OF TRIAL COUNSEL'S ERRORS BE ANALYZED IN DECIDING WHETHER COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED THE DEFENSE AND THUS CONSTITUTED INEFFECTIVE ASSISTANCE UNDER STRICKLAND v. WASHINGTON, 466 U.S. 668, 104 S. CT. 2052 (1984)?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT 4

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO, AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THE EXCESSIVE SENTENCE IMPOSED CONTRARY TO THE SENTENCING COURT'S EXPRESS INTENTION AND WITHOUT THE REQUIRED STATEMENT OF REASONS 4

II. THE CUMULATIVE EFFECT OF THE ERRORS HAD A SUBSTANTIAL AND INJURIOUS INFLUENCE ON THE RESULT OF THE STATE COURT PROCEEDING 12

CONCLUSION 27

APPENDIX

Memorandum Opinion, U.S. Court of Appeals for the Third Circuit, filed November 8, 2001 ..... 1a-6a

Memorandum and Order, U.S. District Court for the Western District of Pennsylvania, filed January 9, 2001 ..... 7a-30a

Order Sur Petition for Rehearing, U.S. Court of Appeals for the Third Circuit, filed January 11, 2002 ..... 31a

TABLE OF AUTHORITIES

FEDERAL CASES

BERGER V. UNITED STATES, 295 U.S. 78, 55 S. CT. 629 (1935) 23

BERRYMAN V. MORTON, 100 F.3D. 1089 (3D CIR. 1996) 14

Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868 (1974) .....

FISHER V. ANGELONE, 163 F.3D 835 (4TH CIR. 1998) 14

GLOVER V. UNITED STATES, 121 S.CT. 696 (2001) 4, 5

GREER V. MILLER, 483 U.S. 756, 107 S.CT. 3102 (1987) 22

HARRIS BY AND THROUGH RAMSEYER V. WOOD, 64 F.3D 1432(9TH CIR. 1995) 14

JONES V. STOTTS, 59 F.3D 143(10TH CIR. 1995) 14

LIVINGSTON V. JOHNSON, 107 F.3D 297 (5TH CIR. 1997) 14

MAK V. BLODGETT, 970 F.2D 614 (9TH CIR. 1992) 14

MARTIN V. PARKER, 11 F.3D 613 (6TH CIR. 1993) 22

RODRIGUEZ V. HOKE, 928 F.2D 534 (2D CIR. 1991) 14

STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S.CT. 2052(1984) ..... *passim*

UNITED STATES V. KNIGHT, 266 F.3D 203 (3D CIR. 2001) 9

WAINWRIGHT V. LOCKHART, 80 F.3D 1226 (8TH CIR. 1996) 14

WILLIAMS V. TAYLOR, 120 S.CT. 1495 (2000) 18

WILLIAMS V. WASHINGTON, 59 F.3D 673 (7TH CIR. 1995) 14

STATE CASE

COMMONWEALTH V. RICH, 392 PA. SUPER. 380, 572 A.2D 1283 (1990) 8

CONSTITUTIONAL PROVISION

U.S. Constitution, Sixth Amendment 1

FEDERAL STATUTES

28 U.S.C. §1254(1) 1

28 U.S.C. §2254 3

28 U.S.C. §2331 3

OTHER SECONDARY SOURCES

204 § 303.1(h) Pennsylvania Sentencing Guidelines 8

ABA Project on Standards for Criminal Justice, The Prosecution Function, Std. 3-5.8(c) 25

ABA Project on Standards for Criminal Justice, The Prosecution Function, Std. 3-5.8(d) 24

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Third Circuit was filed on November 8, 2001. It is not reported; it appears at Appendix 1a-6a to the Petition.

The Memorandum and Order of the United States District Court for the Western District of Pennsylvania was filed on January 9, 2001. It is not reported; it appears at Appendix 7a-30a to the Petition.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 8, 2001. The petition for rehearing was denied on January 11, 2002. This petition for writ of certiorari is filed within ninety days of the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF CASE

Proceedings

On August 5, 1993, an Information alleging various sexual assault crimes was filed against Frank Costa in the Court of Common Pleas of Cambria County, Pennsylvania at Criminal Action No. 0930-1993. After three days of trial, commencing on November 16, 1993, the jury returned a verdict of guilty on 4 counts of involuntary deviate sexual intercourse, 2 counts of aggravated indecent assault, 7 counts of indecent assault, 4 counts of indecent exposure, 2 counts of simple assault, 7 counts of corrupting the morals of a minor, and 7 counts of endangering the welfare of a child.

After motions for new trial and in arrest of judgment were denied, on March 21, 1994 Costa was sentenced to serve a term of 10 to 20 years of imprisonment in a state correctional institution. An appeal from the judgment of conviction was filed in the Superior Court of Pennsylvania. At that time, Costa was represented by his trial counsel. On April 18, 1995, the Superior Court affirmed the judgment of the lower court (Superior Court's Judgment and Memorandum Opinion, 663 A.2d 246).

Costa filed a *pro se* Motion for Post Conviction Collateral Relief in the state court. Subsequently, current counsel was retained to represent Costa, and he filed a Supplemental Motion for Post Conviction Collateral Relief along with a supporting brief. After a hearing, the Court of Common Pleas of Cambria County entered an Opinion and Order, dated October 23, 1996, denying the Motion except that the sentences imposed on 8 counts were vacated. On May 28,

1997, a three-member panel of the Superior Court of Pennsylvania issued a Judgment and a twenty-eight page Memorandum Opinion affirming the Court of Common Pleas. On March 4, 1998, the Supreme Court of Pennsylvania denied Costa's Petition for Allowance of Appeal. Accordingly, Costa had exhausted all state remedies.

Costa, who was in state custody, then filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania at Civil Action No. 98-259J. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. §2254 and §1331. On January 9, 2001, the Court issued a Memorandum and Order, which denied the Petition (Appendix 7a-30a)

Costa filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit. Also, he filed an Application for Certificate of Appealability, which was granted by order of the District Court on February 7, 2001.

On November 8, 2001, the Court of Appeals entered a Memorandum Opinion affirming the District Court's Judgment (App. 1a-6a). On January 11, 2002, the Court of Appeals denied Costa's Petition for Rehearing (App. 31a).

Facts

A ten-year-old boy testified that Costa and his family lived in the same neighborhood and he was a friend of Costa's son. Between December 1992 and March 1993, he said that he was sexually abused by Costa on various occasions.

A doctor presented his diagnosis that the boy had been sexually abused; he also testified

that, in his personal opinion, the abuse had occurred. The boy's mother and the investigating police officer both testified about statements made by the boy concerning the alleged illegal activity and the identity of the alleged perpetrator.

In his own defense, Costa denied the allegations. Mrs. Costa, who resided with her husband, denied any knowledge of the alleged acts. Both Mr. and Mrs. Costa testified about his long-term problem with impotency. A urologist testified that Mr. Costa was impotent at the time he was examined (July, 1993); he could not offer an opinion about the impotency prior to that time. The defense also presented several character witnesses. In rebuttal, three prosecution witnesses said that they had observed Mr. Costa with an erection on various occasions.

Additional facts, where pertinent, are set forth in detail *infra*.

ARGUMENT

I.

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO, AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THE EXCESSIVE SENTENCE IMPOSED CONTRARY TO THE SENTENCING COURT'S EXPRESS INTENTION AND WITHOUT THE REQUIRED STATEMENT OF REASONS.

This Court should grant a writ of certiorari to decide the question of deficient performance by counsel in connection with a challenge to sentencing. This question was not addressed in *Glover v. United States*, 121 S.Ct. 696 (2001),

which pertained to the prejudice prong of the standard under *Strickland v. Washington*, 104 S.Ct. 2052 (1984). It is important that the performance prong of the standard be addressed in the context of a claim of ineffectiveness for failure to object to a legally erroneous sentence.

In *Glover v. United States*, *supra*, this Court held that deficient performance by counsel leading to an increase in a prison sentence imposed pursuant to the federal sentencing guidelines is "prejudicial" under the Sixth Amendment test for counsel effectiveness, regardless of the amount of the increase. While this decision pertained to the prejudice prong of *Strickland*, not the performance component of the test, the Court did state that the amount of increased jail time caused by a particular decision "may be a factor to consider in determining whether counsel's performance in failing to argue the point constitutes ineffective assistance." 121 S.Ct. at 701. Here, Costa's sentence exceeded the guideline range by 45 to 60 months, yet his attorney failed to challenge it. The sentencing court had repeatedly indicated it was intending to sentence in the aggravated range when in fact the court mistakenly sentenced Costa above that range and outside the guidelines, absent an explanation that it was doing so and providing the reasons for such a sentence, contrary to state law. This substantial increase in his term of incarceration, above what was called for in the aggravated range intended by the sentencing court and imposed without objection by defense counsel, is a factor which overcomes any presumption of appropriate professional assistance.

In regard to the incident for which Costa was convicted of involuntary deviate sexual intercourse (No. 930-A-1), he was sentenced to serve a term of ten years to twenty years

imprisonment. The sentence was excessive; it far exceeded the applicable guidelines and was twice the mandatory five-year minimum sentence. Moreover, it was imposed contrary to the sentencing court's express intention and absent the required statement of reasons. But, trial counsel failed to object to it and include it as an issue in a motion to modify sentence, and appellate counsel failed to challenge it on appeal. Accordingly, counsel's performance "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, and as a result Costa was severely prejudiced and deprived of his Sixth Amendment right to be afforded the effective assistance of counsel during the penalty phase. The contrary finding below is an objectively unreasonable application of clearly established law.

Contrary to the Court of Appeals statement about what the District Court had observed concerning the sentencing court's action (Memorandum Opinion, App. 3a), in fact, the sentencing court had clearly stated – three separate times – that the Costa sentence was intended to be within the aggravated range of the guidelines. And the District Court did not dispute this fact. The trial court never said it was departing above the aggravated range, and the District Court did not make such an observation. What the trial court "expressly acknowledged" was that it intended to sentence Costa within the aggravated range of the guidelines. Having so stated three times, but then proceeding to sentence above the aggravated range and outside the guidelines, without saying it was doing so and without providing adequate reasons for such an upward departure, was erroneous.

At Costa's sentencing hearing, the trial court specifically stated: ". . . but I want you to

understand that I am going to be sentencing in the aggravated range on some of these cases, and I want you to understand my reasons" (Sentencing Hearing, Tr. IV 80; emphasis added); the court went on to indicate reasons for doing so (Sentencing Hearing, Tr.IV, 80-81). The court reiterated that ". . . it is appropriate to sentence within the aggravated range" (Sentencing Hearing Tr. IV, 80; emphasis added), and explained its reasoning. Then, before imposing sentence, the court said:

> So these are the reasons that I feel that a sentence of total confinement is appropriate, and these are the reasons that, where I have sentenced you in the aggravated range, I feel those sentences are appropriate.

(Sentencing Hearing, Tr. IV 81; emphasis added).

However, in regard to the sentence at No. 930-A, Count I, which had an aggravated range of 60 to 75 months, the court sentenced Costa substantially above the aggravated range, i.e., to a period of incarceration of ten years to twenty years, or a minimum of 120 months to a maximum of 240 months (Tr.IV, 83). This sentence exceeded the aggravated range by 45 to 60 months, and at the time, the court did not explain its reasons for going outside and above the aggravated range.[1]

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[1] To illustrate how extreme a deviation was imposed on Costa, under §303.10 of the state sentencing guideline amendments effective less than 5 months after Costa's sentencing, for an offense gravity score of nine, if a sentencing court determines that an aggravating circumstance is present, it may impose an aggravated sentence up to six months longer than the top of the *(Continued on next page.)*

Following the completion of the sentencing on all counts, the court said: "I understand that 930-A count one exceeded the mandatory sentence . . ." (Sentencing Hearing, Tr.IV, 89; emphasis added). The mandatory sentence was 60 months. But, the court did not provide an explanation for going outside and above the aggravated range of the guidelines, which was 60 to 75 months.[2]

It is clear that the sentencing court repeatedly expressed its intention that the Costa sentence would be within the aggravated range of the guidelines. However, without explanation, the court actually imposed a period of incarceration substantially above the aggravated range. Thus, the sentencing court (for imposing the sentence) and the reviewing state courts (for allowing it) deviated from their own law. Counsel's failure to object to the sentencing process and later challenge it on appeal cannot be excused. It was unreasonable performance and resulted in severe prejudice to Costa. Accordingly, he was not provided with effective assistance of counsel during the penalty phase.

(Continued from previous page.)
standard range. Costa's sentence was sixty months longer than the top of the standard range.

[2] Under 204 § 303.1(h) of the Pennsylvania Sentencing Guidelines, " . . . [i]n every case where the court imposes a sentence outside the sentencing guidelines the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from this chapter." A resentencing is required where the trial court failed to provide a contemporaneous written statement concerning reasons for an upward deviation from the sentencing guidelines. *Commonwealth v. Rich*, 392 Pa. Super. 380, 572 A.2d 1283, 1285 (1990). Here, Costa's sentence for IDSI was a substantially upward deviation, yet the record does not reflect that the required statement was provided.

Also, the Court of Appeals' decision appears to be in conflict with its decision in *United States v. Knight*, 266 F.3d 203, 205 (3d Cir. 2001), which dealt with the federal sentencing guidelines. There, the Court held:

> . . . under the plain error doctrine, application of an incorrect Federal Sentencing Guidelines range presumptively affects substantial rights, even if it results in a sentence that is also within the correct range. Accordingly, we hold that the District Court committed plain error when it selected Knight's sentence from within the wrong range and we will vacate Knight's sentence and remand for sentencing so that the District Court may apply the correct Guidelines range in the first instance.

(footnote omitted). In Costa's case, the sentencing court repeatedly stated on the record that it intended to sentence within the aggravated range of the state guidelines. In failing to do so, it did not acknowledge the fact that it was going outside that range and indeed sentencing above the guidelines. Selection of Costa's sentence outside the guidelines (or "within the wrong range") was an error in the application of the guidelines, resulting in use of a higher sentencing range. As the Court said in *Knight*, such an error ". . . should be presumed to affect the defendant's substantial rights." 266 F.3d at 207.

The District Court pointed out below:

> Where the trial court has indicated that it was imposing a sentence in the aggravated range and

> actually imposed a sentence which exceeded the aggravated guidelines, the Pennsylvania Superior Court has vacated the sentence and remanded the case for resentencing *Commonwealth v. Wagner*, 702 A.2d 1084, 1086 (Pa. Super. Ct. 1997); *Commonwealth v. Byrd*, 657 A.2d 9961, 964 (Pa. Super. Ct. 1995); *Commonwealth v. Breter*, 624 A.2d 661, 663 (Pa. Super Ct. 1993).

(Memorandum and Order, App. 27a). But, the District Court went on to say that, based on the sentencing court's comments,

> . . . Costa's counsel could have concluded that, notwithstanding the indication that Costa would be sentenced in the "aggravated range" the sentencing court's statement of reasons complied with Pennsylvania law which requires that a departure from the sentencing guideline be accompanied by some indication that the court had considered the guideline.

(Memorandum and Order, App. 27a; citation omitted).

Based on Pennsylvania legal precedent, Costa's sentence was plainly erroneous. If, under different circumstances, it could have been imposed legally, that does not change the result for him. The analysis does not depend on whether the sentencing court gave <u>any</u> statement of reasons. The reasons mentioned by the state court when Costa was sentenced were advanced to support a sentence in the aggravated range.

Nowhere did the state court indicate that it was sentencing Costa above this range and outside the guidelines and provide a statement of reasons for the deviation. Rather, the court mistakenly imposed a sentence which it repeatedly said it was not going to do.[3]

Furthermore, what trial counsel may have concluded is purely speculative. Regardless, if counsel had made such a conclusion, it would have been unreasonable in light of what specifically occurred here. Contrary to the District Court's view, counsel could not have reasonably concluded that the sentencing court's statements were in compliance with the law because the sentencer failed to follow the required elements of the process. The court did not state that it intended to depart from the aggravated range. On the contrary, it repeatedly expressed the intention to sentence in that specific range. The court stated – three times – that it was sentencing in the aggravated range. Thus, the court erred by failing to recognize it was not sentencing within the aggravated range, but was in fact departing upward – substantially – from it. In addition, the court gave no reasons for deviating from the aggravated range. To find that trial and/or appellate counsel could have concluded that there had been compliance with state law lacks any factual basis in the record. And, if such a conclusion had been made by counsel, it would have been completely unreasonable.

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[3] Further evidence of the sentencing court's mistake was the fact that the District Attorney's Office asked for a sentence in the aggravated range. (Sentencing Hearing, Tr.IV, 75).

II.

THE CUMULATIVE EFFECT OF THE ERRORS HAD A SUBSTANTIAL AND INJURIOUS INFLUENCE ON THE RESULT OF THE STATE COURT PROCEEDING.

The Court should grant a writ of certiorari to resolve the issue whether the ineffectiveness standard of *Strickland v. Washington*, *supra*, requires an analysis of the cumulative effect of counsel's errors to decide whether deficient performance prejudiced the defense.

This case presents repeated instances of deficient performance by defense counsel, which the Pennsylvania appellate courts examined individually. These courts concluded that several issues were of arguable merit or that errors occurred in the trial court proceedings, but that no one instance was sufficient to warrant a new trial. Their failure to grant relief for this reason is erroneous because the cumulative effect of the errors had a substantial and injurious effect or influence on the result of the state court proceedings.

The District Court held that the state court's refusal to engage in a cumulative error analysis was not unreasonable because of the existence of a circuit split on the necessity of conducting such an analysis (Memorandum and Order, App.22a). However, the language of *Strickland v. Washington*, *supra*, calls for a cumulative analysis. This Court set forth the standard for reviewing a claim of ineffective assistance of counsel as follows:

> First, the defendant must show that counsel's performance was

> deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S.Ct. at 2064. Thus, the Court twice specifically referred to "errors" made by counsel, once for the performance prong and once for the prejudice prong of the standard. Later in its opinion, the *Strickland* Court explained that to meet the prejudice prong of an ineffectiveness claim

> [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, at 694 104 S.Ct. at 2068. Again, the Court referred to counsel's "errors". Certainly, this clear language calls for an analysis of all of the serious errors by counsel – in short, a cumulative analysis, *i.e.*, whether these errors, individually or together, resulted in a deficient performance that prejudiced the defense.

Some federal courts, including the Third Circuit, have held that the cumulative impact of counsel's deficiencies can be so prejudicial as to

render proceedings fundamentally unfair. *See, e.g., Berryman v. Morton*, 100 F.3d. 1089, 1104 (3d Cir. 1996) ("As a result of [counsel's] errors, [defendant] was deprived of a fair trial"); *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991) ("since the claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions, all [the] allegations of ineffective assistance should be reviewed together. *See Strickland v. Washington*, 466 U.S. 668, 695-96, 104 S.Ct. 2052, 2068-69, 80 L.Ed. 2d 674 (1984)"); *Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995) ("a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was substantial enough to meet *Strickland's* test"); *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992) ; *Harris by and through Ramseyer v. Wood*, 64 F.3d 1432, 1438-1439 (9th Cir. 1995) . But, other courts have held that ineffectiveness claims must be reviewed individually, rather than collectively. See: *Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998); *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996); *Jones v. Stotts*, 59 F.3d 143, 147 (10th Cir. 1995); *Livingston v. Johnson*, 107 F.3d 297, 309 (5th Cir. 1997). Therefore, since the circuits are split on whether a cumulative error analysis must be conducted under *Strickland*, this Court should grant the writ in this case and make clear that such an analysis is required.

In the instant case, the state courts did not consider the following instances of counsel's ineffectiveness in the aggregate.

A. Inadmissibility of the prosecution's expert testimony regarding sexual abuse of the victim.

During testimony that the prosecution termed "very crucial in this case" (Tr.I, 15-16), a doctor testified about his examination of the child victim and his findings and opinions. The doctor offered his personal opinion that the sexual acts happened as the child had testified; he said: "If this happened, which I believe it did . . . ." (Tr.I, 112-113). This was impermissible testimony on the reliability of the victim. In effect, the expert told the jury that he found the victim to be credible, and the jury should do likewise.

Costa argued in the Pennsylvania courts that his trial counsel's failure to object to this testimony rendered ineffective assistance. The Superior Court of Pennsylvania admitted that this "raised an issue of arguable merit", since an expert may not testify as to the credibility of a witness, but the court concluded that the omission of the testimony would not have changed the trial's outcome (Memorandum Opinion, 9). The District Court did not find that the state courts' decision was unreasonable. However, by not agreeing with Costa that the doctor's testimony was the most important evidence at trial (Memorandum and Order, App. 14a), the District Court overlooked the fact that the prosecution itself called the doctor's testimony "very crucial" to its case (Tr.I, 15-16). Consequently, how can its erroneous admission into evidence not have deprived Costa of his right to a fair trial?

Regarding his examination of the child, the doctor also opined that: (1) there was anal sexual abuse (Tr.I, 103 and 131); (2) the child's symptoms were "consistent and typical" with a child who has been sexually abused (Tr.I, 105); and (3) the diagnosis was of the "highest degree" of medical certainty (Tr.I, 108). All of this testimony was improper. Its sole purpose was to enhance the

child's credibility on the crucial question of whether the alleged incidents of sexual abuse did in fact occur. This purpose is plainly prohibited under the law.

The doctor's testimony, *i.e.*, a medical expert's opinion on the ultimate question before the jury, was inadmissible, but trial counsel failed to object to it. There could have been no rational basis for allowing it to be presented and its prejudicial effect was extremely damaging. No reliable adjudication could have occurred as a result. Because this evidence was critical to the prosecution's case, its erroneous admission into evidence deprived Costa of his due process rights to a fair trial. Therefore, trial counsel was ineffective for failing to object and appellate counsel was ineffective for failing to raise it on appeal.

B. Improper admission of other uncharged crimes evidence.

Another instance of objectionable testimony involved a police officer's testimony about other uncharged crimes evidence, which the Pennsylvania courts conceded was improper (Common Pleas Opinion and Order, 7; Superior Court Memorandum Opinion, 16). During presentation of evidence by the defense, a defense witness was asked on cross-examination by the prosecutor whether he had a conversation with the investigating police officer to report the abuse of his sons by Frank Costa; he denied such a conversation (Tr.III, 23). In rebuttal, the prosecution re-called the police officer who was permitted to testify, over counsel's objection, that he only knew the defense witness "from today" (Tr.III, 55). The officer said that he had received a telephone call from a male who stated his name,

but the officer could not say that the voice on the telephone and voice in court were that of the same person. The caller had stated that his two sons had told him that Costa had molested them while they stayed at the Costa house (Tr.III, 57). On cross-examination, the officer admitted that he did not get a telephone number to contact the caller to follow-up on the investigation, nor did he get a specific address (Tr.III, 57-58). The defense attorney went on to have the officer elaborate: "The caller stated that his children . . . were very upset and he felt that the children would not be able to come forward" (Tr.III, 58). The officer then concluded by saying that he only knew what he got from the telephone call (Tr.III, 58-59).

This testimony presented evidence of additional, uncharged crimes. It was not a mere passing reference or implication. It was descriptive and clearly identified Costa as allegedly involved in other uncharged sexual abuse offenses. As such, it was extremely inflammatory hearsay testimony that was not admissible under any theory. None of the exceptions for admission could pertain since the evidence was illegitimate *ab initio*. Based on a telephone call from an unknown person, it was presented without the slightest indicia of reliability. It was not probative in any way, only highly prejudicial. It was hearsay from an unidentified and uncorroborated source. To place such testimony before the jury without verifying its reliability through the witness offering it was prosecutorial misconduct.

This evidence was bound to have poisoned the jury because it created the impression that Costa had a penchant for the alleged criminal activity. The damage was done when the jury heard it. The only inference that the jury could have drawn from these impermissible, unreliable

allegations of prior, uncharged molestation was that Costa was a depraved character who was consequently more likely to have molested the alleged victim. In light of the inflammatory nature of this evidence, it was certain to have had an horrendous prejudicial effect. It cannot be said with any reasonable certainty that the outcome of the trial would not have been different had this evidence not been presented. Thus, there could not have been any valid basis for failing to raise and argue this issue on appeal.

Significantly, the District Court did not agree with the state court's evaluation of the detective's testimony not conveying to the jury, expressly or by reasonable implication, that Costa had in fact committed an unrelated criminal offense. As the District Court concluded: "Undoubtedly, this testimony is consistent with an inference that Costa had a propensity to commit the offenses for which he was charged." (Memorandum and Order, App. 15a). But, the District Court went on to say that the state court's conclusion that the inference was substantially outweighed by the victim's testimony and the medical evidence was not unreasonable. This does not pass the *Williams v. Taylor*, 120 S.Ct. 1495, 1521-23 (2000), "unreasonable application" test. Since all the reviewing courts have determined that this testimony was improper, the only remaining question is the degree of prejudice. Under the circumstances of this case, it is not objectively reasonable to conclude that this testimony was not extremely prejudicial.

The combination of the prosecutor's cross-examination of the defense witness and the police officer's direct testimony introduced extrinsic evidence of unproven acts of alleged misconduct (which did not even result in an arrest). This was

error. The erroneous admission of this evidence was not harmless, especially in a case like the instant one, where credibility was crucial. Accordingly, the failure to properly preserve this issue at trial and then raise and argue it on appeal constitutes the ineffectiveness of counsel; to conclude otherwise would be an unreasonable application of clearly established law.

C. Inadmissibility of prejudicial hearsay statements by prosecution witnesses.

Prejudicial hearsay statements by two prosecution witnesses, the mother of the alleged child victim and the investigating police officer, were erroneously admitted into evidence. These statements did not qualify for an exception to the hearsay rule. Due to their extremely prejudicial character and obviously negative impact upon the case, their erroneous admission cannot be considered harmless. The mother's testimony was objected to by defense counsel and overruled by the trial court, but the issue was not pursued on appeal despite the ruling having been clearly erroneous. The police officer's testimony was not objected to by trial counsel nor pursued on appeal. Failure to object to the admission of these statements, and/or the failure to raise the issue on appeal, constitutes ineffective assistance of both trial counsel and appellate counsel. The state courts' (and District Court's) contrary conclusion is an objectively unreasonable application of clearly established law.

During the mother's testimony, she was permitted to testify about two statements made to her by her son: 1) his fear that Costa "might try to make a move on" another person named "Eddie"; and 2) "I'm not gay; don't call me gay" (Tr.II, 19-20). This testimony identified the perpetrator of

the alleged offenses and was used by the prosecution to bolster the credibility of the single complaining witness, her son.

Similarly, the police officer testified about interviewing the child victim. He was permitted to testify, without objection, that he had a "detailed interview with the child, going into detail of multiple acts", which made it "obvious" that both a report and medical examination were necessary (Tr.II, 64-65). This hearsay was presented only to bolster the testimony of the alleged victim.

Both of these witnesses named the alleged perpetrator. The mother related her son's comments about not being "gay", and the police officer referred to the alleged victim "going into detail of multiple acts." Then, both witnesses related what they did based upon the statements made to them by the alleged victim. Such testimony went beyond all permissible bounds.

As to the police officer's testimony, the District Court concluded that the state court determinations that the statements were not hearsay and not objectionable were not an unreasonable application of the *Strickland* standard. As to the statements by the victim's mother, the District Court concluded: "While it may have been error by appellate counsel not to preserve this issue for appeal, the superior court's determination that this evidence was not prejudicial is not objectively unreasonable." (Memorandum and Order, App.17a). However, the Costa defense rested upon the credibility of his testimony denying the allegations. The case was a contest of credibility between the victim and defendant. By allowing the jury to consider the hearsay evidence of the mother and the police officer, the prosecution's version of events was

unfairly presented. This erroneously admitted testimony had a devastating impact on the jury. It could not possibly have been harmless. Certainly, the prosecutor considered it to be significantly damaging because he highlighted the mother's testimony during closing argument to the jury (Tr.III, 102-103). The testimony of both witnesses was inflammatory and improperly corroborative. It only served to further bolster the alleged victim's credibility, which was the key issue in the case. Without this testimony having been heard by the jurors, there is more than a "reasonable probability that . . . the result of the [trial] would have been different." *Strickland v. Washington*, 466 U.S. at 694, 104 S. Ct. at 2068 .

D. Impropriety of the prosecutor's remarks to the jury.

There were numerous improper and highly prejudicial remarks made by the prosecutor when he addressed the jury. Trial counsel should have moved for a mistrial; instead, these remarks went without objection. In each instance, trial counsel's omissions lacked an objectively reasonable basis designed to further Costa's interests, and they were so prejudicial to him that there is a reasonable probability that, absent counsel's errors, the jury would have had a reasonable doubt regarding Costa's guilt. Therefore, trial counsel's failure to object and move for a mistrial constitutes ineffective assistance of counsel. Likewise, appellate counsel's failure to preserve the issue and raise it on appeal constitutes ineffectiveness. The state courts' and District Court's contrary conclusion is an objectively unreasonable application of clearly established law.

It has long been recognized that a prosecutor has a strong influence over a jury. This

influence is even greater in cases involving alleged sexual abuse. As the Court observed in *Martin v. Parker*, 11 F.3d 613, 616-617 (6th Cir. 1993), such cases "exert an almost irresistible pressure on the emotions of the bench and bar alike" because they usually turn on the credibilities of the prosecuting witness and the defendant. Consequently, in such cases, a "strict adherence to the rules of evidence and appropriate prosecutorial conduct is required to ensure a fair trial." *Id.*

Federal habeas corpus relief may be granted when "prosecutorial misconduct may 'so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process.'" *Greer v. Miller*, 483 U.S. 756, 765, 107 S.Ct. 3102 (1987) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868 (1974)).

The District Court concluded that the state court's application of law was not objectively unreasonable in light of the evidence supporting the conviction and the jury's instructions that the prosecutor's comments were not evidence. However, the impropriety of the prosecutorial remarks, and the resultant effect on the listeners – the jury – cannot be ameliorated by jury instructions. Nor can the evidence in the case, which was in large part a credibility contest, not have been tilted in the prosecution's favor because of the highly emotional, inflammatory nature of the remarks and the trial itself.

1. During closing argument, the prosecutor improperly expressed his personal opinion about the defense. In referring to the testimony presented by Costa in his own defense, the prosecutor said:

> There's something I can only characterize as idiotic, the defendant offered that Bobby Williams concocted this and got Gregory to concoct this because he didn't get a car from the defendant. You can judge that as you will. I think that is asinine.

(Tr.III, 104). As the trial court admitted, this was an "inappropriate comment" (Opinion and Order, 9); and the Superior Court agreed that "the prosecutor improperly disparaged a defense strategy" (Memorandum Opinion, 19). A moment later, in referring to the character witnesses presented by the defense, the prosecutor said:

> You've heard the character witnesses testify that, well, he has a good reputation for truthfulness and honesty . . . this testimony doesn't mean a hill of beans as far as I am concerned.

(Tr.III, 105). Such personal opinions are clearly prohibited. *Berger v. United States*, 295 U.S. 78, 85-88, 55 S. Ct. 629 (1935).

2. The prosecutor spoke to the jurors about how they would have to decide this case, and in doing so he made legally incorrect, inflammatory and prejudicial statements. Specifically, he told the jury:

> Now, you saw him and you heard Gregory. You have you to decide whether, in fact, he is innocent. Whether he is in fact he has been brutally victimized, whether he has been raped and raped, sodomized, fondled, forced to perform oral sex, or

> you have to decide whether that child is a liar, who concocted, I think, some of the most horrendous and ruinous allegations imaginable.

(Tr.III, 94). This recitation of legal standards for judging the case was erroneous. First, a jury never decides whether a victim is "innocent." Second, jurors are never called upon to decide whether an alleged victim (in this case, a child) is a "liar." It was incorrect to tell the jurors that they had to make these decisions. Rather, the correct standard is whether the prosecution has proven each element of the offense beyond a reasonable doubt. Also, these prosecutorial remarks were an impermissible attempt to elicit sympathy for the boy, who testified on behalf of the prosecution, and a violation of the ABA Project on Standards for Criminal Justice, The Prosecution Function, Std. 3-5.8(d).

3. The prosecutor made other comments during closing argument which impermissibly appealed to the jurors' emotions. The prosecutor said:

> The heart of this case is the testimony of Gregory, the young child who is eleven years old. He sat there on the stand for over an hour, I believe for over an hour, under cross-examination by [Attorney] Abood, who cross-examined him in the great length, quite extensively. It was, I think you'll agree with me, an ordeal. It was brutal, embarrassing, and demeaning. It's hard for an eleven year old boy to do. It's hard for an adult to do, let alone a child, to sit

> there and testify as to what he can only testify as to abominations.

(Tr.III, 93-94). The prosecutor called the defense examination of the child "an ordeal", "brutal, embarrassing, and demeaning." Then he said the testimony was about "abominations." A moment later, the prosecutor told the jury (erroneously) that it would have to decide whether the child was a liar "who concocted, I think, some of the most horrendous and ruinous allegations imaginable." (Tr.III, 94). Aside from the declaration of personal opinion, these remarks were purely inflammatory and prejudicial rhetoric, and served no purpose other than to make an emotional appeal to the jury in violation of the ABA Project on Standards for Criminal Justice, The Prosecution Function, Std. 3-5.8(c). Instead of a judgment warranted by the evidence, such remarks caused a verdict inspired by emotion or passion. They were nothing more than an attempt to divert the jury's attention from an objective evaluation of the evidence and applicable law. Unavoidably, the effect of these remarks was to prejudice the jury, forming in their minds a fixed bias and hostility toward Costa. When this occurs, it results in cause for reversal.

E. Cumulative Analysis

When they are analyzed cumulatively, it is apparent that the right to due process was violated and the resulting prejudice was so severe that a new trial is required. Considering the improperly admitted medical expert testimony, the improperly received hearsay statements and uncharged crimes evidence, along with the negative impact of the prosecutor's improper argument to the jury, the combined errors were bound to have had a substantial effect on the jury and adversely influenced the outcome of the trial proceedings.

The number and severity of these errors lead to the inescapable conclusion that there is a reasonable probability that they changed the outcome of the trial. See *Strickland*, 466 U.S. at 695, 104 S.Ct., at 2068. Certainly, the cumulative effect of these errors rendered the proceedings fundamentally unfair. See *id.* at 696, 2069.

When the state courts dismiss each recognized error as "harmless" or insufficient to change the outcome of the proceedings, the flaw in their analysis is readily apparent. They only look at one error at a time, instead of the cumulative effect of all the errors in the aggregate. It is critical, when reviewing these proceedings, to consider the entire picture, not just part of it. Perhaps one error or another may not be enough to alter the outcome, but one error builds upon another and all of them together can compel the conclusion – as here – that a fair trial was not afforded to the accused.

Ineffectiveness of counsel claims are frequently placed before the courts. It is important that there not be a conflict over the *Strickland* standard and its formula for resolution of these claims. Therefore, this Court is urged to grant the writ of certiorari and review this significant issue.

CONCLUSION

Based upon the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

UNREPORTED/NOT PRECEDENTIAL

No. 01-1333

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FRANK COSTA,
Appellant,

v.

JOHN R. MCCULLOUGH, Superintendent, SCI Houtzdale;
ATTORNEY GERNERAL OF THE COMMONWEALTH OF PA.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
D.C. Civil No. 98-cv-00259J
District Judge: The Honorable D. Brooks Smith

Submitted Under Third Circuit LAR 34.1(a)
October 16, 2001

Before: ALITO, BARRY, and ROSENN, Circuit Judges

(Opinion Filed: November 8, 2001)

MEMORANDUM OPINION OF THE COURT

BARRY, Circuit Judge

On November 18, 1993, appellant Frank Costa was convicted by a Pennsylvania jury of 33 counts of sexual assault on a ten-year old boy. On March 21, 1994, Costa was sentenced to serve 10 to 20 years in a state correctional institution. After pursuing available state remedies, he filed a habeas corpus petition pursuant to 28 U.S.C. §2254(d)(1) alleging ineffective assistance of counsel at trial and on direct

appeal. The petition was denied, and this appeal followed. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 2254, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 2253. We will affirm.

I.

The parties are familiar with the background of the case and we have carefully reviewed the District Court record. Accordingly, we will discuss the facts underlying this case only as necessary to resolve the issues presented.

Costa contends that habeas relief is warranted because he was denied the effective assistance of counsel at trial and on appeal in violation of the Sixth Amendment and that the cumulative effect of counsel's errors rendered the proceeding fundamentally unfair in violation of the Fifth and Fourteenth Amendments. To prevail on appeal, Costa must show that the Superior Court's refusal to grant collateral relief was "contrary to" or involved an "unreasonable application of' the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984).[1] 28 U.S.C. § 2254(d)(1); Hamen v. Delaware, 212 F.3d 226, 235 (3d Cit. 2000), cert. denied, 121 S. Ct. 1365 (2001).

II.

With this standard in mind, we turn to Costa's various contentions. He claims, first, that the State's medical expert impermissibly vouched for the victim's credibility and unfairly opined about the ultimate issue in the case. Similarly, he claims that the victim's mother and an investigating police detective improperly bolstered the victim's credibility. Costa asserts that the Superior Court's refusal to find ineffective assistance of counsel based on the failure by counsel to object to and/or appeal from the admission of this evidence was an unreasonable application of Strickland, particularly because the victim's credibility was "crucial" to the ease.

The Superior Court found that this evidence was not objectionable and, in any event, that the failure to object or to appeal was not prejudicial because of the other "overwhelming" evidence of Costa's guilt, including the victim's own testimony of multiple acts of sexual abuse, the substantial medical evidence of sexual abuse, and the testimony of several witnesses that severely undermined the credibility of Costa's primary defense of impotency. We agree with the District Court, that the Superior Court's conclusions cannot be deemed an objectively unreasonable application of Strickland.[2]

Costa next claims that counsel failed to complain on appeal of testimony by an investigating detective about an anonymous phone call used to impeach one of Costa's character witnesses, Raymond Rhoades. He claims that this testimony improperly permitted the jury to hear evidence of uncharged crimes. The Superior Court again found, among other things, that the failure to raise this issue on appeal was not prejudicial in light of the "overwhelming" evidence against Costa. We, like the District Court, cannot conclude that the Superior Court's finding of no prejudice was an objectively unreasonable application of Strickland.

Costa next complains of counsel's failure to move for a mistrial or to appeal statements made by the prosecutor during closing argument.[3] The Superior Court concluded that the prosecutor's statements were not objectionable because they were fair replies to comments by defense counsel and, in any event, simply did not rise to the level of a due process violation. Moreover, the trial court properly instructed the jury that the prosecutor's statements were not evidence. Accordingly, the Superior Court concluded, counsel's failure to object did not deviate from objective professional norms and there was no Strickland violation. We agree. Accord. Werts, 228 F.3d at 205 ("If the remarks themselves are not improper, counsel cannot be held ineffective for failing to object to them.").

Finally, Costa contends that counsel was ineffective at the sentencing phase and on appeal because the trial court imposed a sentence above the aggravated guideline range without making a proper record for such a departure.[4] As the District Court observed, the trial court expressly acknowledged that it was departing above the aggravated guideline range as to one count and gave ample reasons supporting the departure. Given the strong presumption that counsel's conduct falls within the "wide range of reasonable professional assistance," Strickland, 466 U.S. at 689, and the record of sentencing,

Costa's final contention fails.[5]

One last note. Because each of Costa's contentions is unavailing, the cumulative effect of those contentions could not, and surely did not, render the state proceedings fundamentally unfair.

III.

For the foregoing reasons, we will affirm.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

/s/Maryanne T, Barry
Circuit Judge

Footnotes

[1] To make out an ineffective assistance of counsel claim under Strickland, a defendant must show that (1) counsel's performance was deficient; and (2) that the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687; see also Williams v. Taylor, 529 U.S. 362, 390 (2000); Werts v. Vaughn, 228 F.3d 178, 203-04 (3d Cir. 2000), cert. denied, 121 S. Ct. 1621 (2001). To satisfy the first prong of this test, a defendant must show that counsel's representation fell

below an objective standard of reasonableness. Strickland, 466 U.S. at 688. To establish "prejudice," he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

[2] The cases cited by Costa are not to the contrary because in those cases the hearsay evidence complained of was essentially the entirety of the prosecution's proof. Commonwealth v. Spetzer, 722 A.2d 702, 713-14 (Pa. Super. Ct. 1998) (finding ineffective assistance of counsel where the "only evidence" available to prove most of the alleged crimes was in the form of inadmissible hearsay and confidential communications between spouses), appeal granted, 747 A.2d 368 (Pa. 1999); Mason v. Hanks, 97 F.3d 887, 890, 899 (7th Cir. 1996) (finding ineffective assistance of counsel where petitioner was convicted almost entirely because of hearsay statement of anonymous informant); Freeman v. Class, 95 F.3d 639, 643 (8th Cir. 1996) (finding ineffective assistance where counsel offered document containing incriminating hearsay of an accomplice, where essentially all of the evidence against the defendant came from the accomplice, who testified against the defendant in exchange for having charges dismissed and whose testimony itself was a basis for finding ineffective assistance of counsel). Costa's citations to cases involving expert witnesses are similarly inapposite.

[3] A prosecutor's conduct may create a due process violation where, when viewed in the context of the entire trial and when considering the statements of defense counsel, the conduct in question infects the proceeding to a point that the defendant was deprived of a fair trial. Greer v. Miller, 483 U.S. 756, 765 (1987); Werts v. Vaughn, 228 F.3d 178, 196-97 (3d Cir. 2000), cert. denied, 121 S. Ct. 1621 (2001).

[4] At the time of Costa's state court petition for collateral relief Pennsylvania courts refused to address discretionary sentencing issues if those issues were part of an ineffective

assistance of counsel claim. Commonwealth v. Lantzy, 736 A.2d 564, 569 (Pa. 1999). Accordingly, the Superior Court did not reach the merits of this issue.

[5] The cases cited by Costa do not compel a different result. The sentencing courts in those cases appeared to be guided by a material misapprehension or a miscalculation of the proper guideline ranges. Commonwealth v. Rodda, 723 A.2d 212, 214 (Pa. Super. Ct. 1999) (describing Commonwealth v. Wagner, 702 A.2d 1084 (Pa. Super. Ct. 1997), Commonwealth v. Byrd, 657 A.2d 961 (Pa. Super. Ct. 1995), and Commonwealth v. Royer, 476 A.2d 453 (Pa. Super. Ct. 1984), upon which Costa relies, as cases involving a material misapprehension of the guidelines). There is nothing here which even suggests that the trial court miscalculated or misapprehended the applicable range. See Commonwealth v. Guth, 735 A.2d 709, 712 (Pa. Super. Ct.) (affirming upward departure where sentencing court provided reasons and recognized departure from guidelines), appeal denied, 743 A.2d 915 (Pa. 1999).

No. 01-1333

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FRANK COSTA,
Appellant,

v.

JOHN R. MCCULLOUGH, Superintendent, SCI Houtzdale;
ATTORNEY GERNERAL OF THE COMMONWEALTH OF PA.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
D.C. Civil No. 98-cv-00259J
District Judge: The Honorable D. Brooks Smith

Submitted Under Third Circuit LAR 34.1(a)
October 16, 2001

Before: ALITO, BARRY, and ROSENN, Circuit Judges

(Filed: November 8, 2001)

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on October 16, 2001.

After consideration of all contentions raised by the appellant, it is

ADJUDGED and ORDERED that the judgment of the District Court be and is hereby affirmed. All in accordance with the Memorandum Opinion of the Court.

ATTEST:

Marcia M. Waldron, Clerk

Dated; November 8, 2001

No. 01-1333

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FRANK COSTA,
Appellant,

v.

JOHN R. MCCULLOUGH, Superintendent, SCI Houtzdale;
ATTORNEY GERNERAL OF THE COMMONWEALTH OF PA.

Present: ALITO, BARRY, and ROSENN, Circuit Judges

(Dated: January 11, 2002)

SUR PETITION FOR PANEL REHEARING

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in this decision having asked for rehearing, the petition for rehearing is DENIED.

BY THE COURT:

/s/
Circuit Judge

Dated: January 11, 2002

Civil Action No. 98-259J

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRANK COSTA,
Petitioner,

v.

JOHN R. MCCULLOUGH, Superintendent of SCI Houtzdale
MEMORANDUM and ORDER,
Respondent.

D. BROOKS SMITH. District Judge

I. Introduction

On November 2, 1998, petitioner Frank Costa filed an application for writ of habeas corpus. Dkt. no. 1. The petition was referred to United States Magistrate Judge Robert C. Mitchell for a report and recommendation in accordance with the Magistrates Act, 28 U.S.C. §636 (b)(l), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates. On January 11, 1999, the magistrate filed a report which recommended that 1 deny Costa's habeas petition, dkt. no. 7. It did not, however, apply the standards enacted by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 110 Stat. 1214, codified, in part, in 28 U.S.C. § 2254. The AEDPA standards govern the disposition of this habeas proceeding because this § 2254 petition was filed "after the Act became effective" on April 24, 1996. Lindh v. Murphy, 521 U.S. 320, 336 (1997). Accordingly, I apply those standards in my de novo review of the instant habeas petition.

II. AEDPA Standard of Review

Section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Petitioner contends that habeas relief is warranted because he was deprived of the effective assistance of both trial and appellate counsel in violation of the Sixth Amendment to the United States Constitution and that the cumulative effect of counsel's deficiencies and other trial errors rendered the proceedings fundamentally unfair in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Thus, § 2254(d)(2) is not at issue and I must apply the standard of review applicable for § 2254(d)(1) claims.

In Williams v. Taylor, ___ U.S. ___, 120 S.Ct. 1495 (2000), the Supreme Court addressed the standard of review applicable to § 2254(d)(l) claims. Subsequently, in Hamen v. State of Delaware, 212 F.3d 226, 235 (3d Cir. 2000), the Third Circuit observed:

> The Court in Williams v. Taylor held that "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that

> reached by [the Supreme] Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." Williams v. Taylor further held that "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable" Thus, under the "unreasonable application" clause, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." The Court in Williams v. Taylor made it clear that the "contrary to" and "unreasonable application" clauses have independent meaning.

Hamen, 212 F.3d at 235 (quoting Williams,120 S.Ct. at 1521-23). The Williams Court further explained that the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" set forth in § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of Supreme Court decisions as of the time of the relevant state court decision. Williams, 120 S.Ct. at 1523.

III. Facts and Procedural History

Costa was charged with 39 counts of sexual abuse of a ten year old boy, OS, who was a friend of Costa's son. The abuse allegedly occurred over a three or four month period

between December 1992 and March 1993. The charges included various counts of involuntary deviate sexual intercourse, aggravated indecent assault, indecent assault, indecent exposure, simple assault, recklessly endangering another person, corruption of minors and endangering the welfare of children. Tr. I, at 5.[1] A three day trial commenced November 16, 1993 after one of the counts was withdrawn by the district attorney.

The first witness during the trial was the victim, GS, who related what happened the first time the petitioner entered the guest room where GS was spending the night at the Costa home in December 1992. GS also detailed what happened on several subsequent occasions. Dr. Rosenberg, a pediatrician, was the prosecution's next witness. He described the results of his physical examination of the victim, which revealed scar tissue around the anus, He also opined that

> a process occurred in which the anus was distended past its capability - by a firm, large object past its ability to cause this tissue rip. In my field of dealing with child sexual abuse, this, in the absence of any rectal findings of constipation, is what we doctors called in lay terms, this signifies sexual anal sexual abuse.

Tr. I, at 103. Other prosecution witnesses included the victim's mother, another acquaintance of Costa's son and the victim, and the investigating police officer, Detective Rok.

The defense opened by calling the defendant's wife, who denied any knowledge of the abuse and testified that her husband had been impotent for "about nine or ten years." Tr. II, at 91, 93-94. Costa took the stand after his wife testified, denying the charges and testifying about his medical condition, Dr. Carney, a urologist, followed, He explained the results of certain medical tests to which Costa was subjected. Several character witnesses, including witness Raymond Rhoades, were also called to testify during the defense. In

rebuttal, the prosecution recalled Detective Rok and called three friends of both Costa's son and the victim. The latter witnesses testified that they had seen Costa with an erection in December 1992. Tr. III, at 60-74. The defense concluded by recalling Rhoades.

The jury returned verdicts of guilty on thirty-three of the thirty-eight charges on November 18, 1993. Tr. III, at 158-164. Post-trial motions were denied on March 18, 1994 and Costa, represented by new counsel, was sentenced to an aggregrate term of 10 to 20 years at a state correctional institution on March 21, 1994. Dkt. no. 2, at 2

Costa filed a direct appeal from judgment of sentence to the Pennsylvania Superior Court, see dkt. no. 7, at 2 (listing issues raised on direct appeal), which affirmed on April 18, 1995. Costa did not petition for allocatur to the Pennsylvania Supreme Court.

Costa, proceeding pro se, next filed a motion for relief under the Post Conviction Relief Act, 42 Pa. C.S.A. § 9541, with the Court of Common Pleas of Cambria County. The request for relief under the PCRA was denied, and that decision was affirmed by the superior court See dkt. no. 7, at 2-3 (listing issues presented on appeal from order denying relief under the PCRA). A request for allocatur to the Pennsylvania Supreme Court was denied. See dkt. no. 7, at 2 (listing issues presented in request for allocatur).

Costa's petition for writ of habeas corpus asserts that he

> was denied [his] constitutional rights to the due process of law and the effective assistance of counsel, resulting in the denial of my constitutional right to a fair trial, for the following reasons:
>
> 1. The Commonwealth's expert testimony regarding sexual abuse of

the victim was improper and erroneously admitted into evidence.

2. Other uncharged crimes evidence was improperly admitted.
3. The Prosecutor's remarks during closing argument to the jury, including personal opinion, incorrect statements of the law and other inflammatory comments, were improper.
4. Prejudicial hearsay statements by Commonwealth witnesses were erroneously admitted into evidence.
5. The sentence was excessive and it was imposed contrary to the Court's express intention and without the required statement of reasons.

Dkt. no. 1.

IV. Ineffective Assistance of Counsel Claims

A. Exhaustion Requirement

"[A] prerequisite to federal habeas review is that the petitioner have exhausted the remedies available to him in the state courts to the extent such remedies exist and are effective." Werts v. Vaughn, 228 R3d 178, 1 92 (3d Cir. 2000). The respondent concedes that the petitioner has exhausted the issues raised in his habeas application. Dkt. no. 6, at 2 n.4. I agree that Costa has exhausted his claims that he was deprived of the effective assistance of both trial and appellate counsel with respect to issues relating to the guilt phase of his trial.

B. Applicable Law

Application of the Williams standard requires identification of the specific legal rule that petitioner seeks to apply and a determination of whether that rule "was clearly established at the time his state court conviction became

final." Williams, 120 S.Ct. at 1511. "It is past question that the rule set forth in Strickland [v. Washington, 466 US. 668 (1984),] qualifies as clearly established Federal law, as determined by the Supreme Court of the United States." Williams, 120 S.Ct. at 1512. In Strickland, the Supreme Court explained that there are two components to demonstrating a violation of the right to effective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defendant. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687. The Williams Court reiterated that

> To establish ineffectiveness, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." To establish prejudice he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Williams, 120 S.Ct. at 1511 (quoting. Strickland, 466 U.S. at 688, 694),

In Werts v. Vaughn, 228 F.3d at 203, the Third Circuit traced the development of Pennsylvania's standard judging ineffectiveness claims, and noted the Pennsylvania Supreme

Court's conclusion that its standard "was identical to the ineffectiveness standard enunciated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984)." Werts, 228 F.3d at 203 (citing Commonwealth v. Pierce, 527 A.2d 973, 976-77 (Pa.1987)). The Third Circuit agreed that "the state appellate courts did not apply a rule of law that contradicts the Supreme Court's holding in Strickland, and it proceeded to address the question of whether the state court had unreasonably applied that rule of law. Werts, 228 F.3d at 204 Consistent with Werts, I turn to whether the state court unreasonably applied Strickland's clearly established rule of law.

C. Medical Expert Testimony

The first issue Costa argues is that the medical expert, Dr. Rosenberg, impermissibly offered a personal opinion that the acts happened as the child had testified. This issue is drawn from the following trial testimony:

> Q. Well, it is also possible, is it not, that if we assume what this boy has testified to as being true, that after the actual act and one pulls up their underpants, that the blood would be there also; would it not?
>
> * * *
>
> Q. I meant after the act in the evening, if we assume what he said was true.
>
> A. this happened, which I believe it did, and he applied - pulled up his underpants and the underpants were against his skin, then I would expect to see blood, correct.

Tr. I, at 112-13. Such testimony, Costa contends, impermissibly vouched for the victim's credibility, but was not objected to by trial counsel and was not raised as an

ineffectiveness issue by appellate counsel on direct appeal. Costa asserts that these lapses deprived him of his right to effective assistance of counsel.[2]

Costa points out that the superior court acknowledged that he had "raised an issue of arguable merit" with respect to the initial statement of Dr. Rosenberg that he believed that the events occurred. Appendix at 59a.[3] The superior court concluded, however, that Costa had failed to prove that the outcome would have been different, reasoning that

> In this case, the jury was confronted with the victim's accusations of repeated sexual abuse. Those accusations were supported by physical findings that revealed evidence of anal sexual abuse. The appellant denied the accusations, relying primarily on his claimed impotence. Appellant's credibility in that regard was severely undermined by friends of both appellant's son and the victim.

Id. at 59a-60a.

Costa argues that the state court's decision that this improper testimony by Dr. Rosenberg was not prejudicial "was erroneous." Dkt. no. 2, at 7. He asserts that it was "severely prejudicial [because] this testimony was the most important evidence in the case." Id. The state court concluded, however, that the outcome would not have been different in light of the testimony of the victim, which was supported by physical findings, and the fact that Costa's defense was undermined by other evidence of record. Appendix at 59a. Having reviewed the trial transcripts, I cannot conclude that the state court's decision was unreasonable. The victim was a ten old boy who was able to identify the perpetrator and to describe in detail what happened on several occasions to the jury. As a result, I cannot agree with petitioner that the doctor's testimony was the most important evidence at trial. Cf. Snowden v.

Singletary, 135 F.3d 732, 738 (11th Cir. 1998) (expert testimony that 99.5% of abused children tell the truth was prejudicial where case against petitioner was "based almost entirely upon the stories told by three young-children witnesses" and there was no physical evidence of abuse beyond the fact that one child was treated for a sexually transmitted disease); Balodis. 747 A.2d at 343-46 (defendant prejudiced by admission of social worker's opinion that delay in reporting details of abuse was consistent with child sexual abuse even though there was medical evidence of anal scarring because victim testified to sexual encounters with other individuals and there was no evidence linking defendant to abuse).

D. Failure of Trial Counsel to Preserve for Appeal Admission Other Uncharged Crimes

Costa's second contention relates to the impeachment of his character witness, Raymond Rhoades, who denied that he had reported the abuse of his sons by petitioner to Detective Rok. On rebuttal, Rok was permitted to testify, over trial counsel's objection, that he had received a telephone call in September 1993 from an individual who identified himself as Raymond Rhoades. Although Rok had heard Rhoades testify for the defense, Rok could not verify that the voice he heard from the witness stand was the same voice that he heard during the telephone conversation. Nevertheless, he elaborated that the caller had indicated that Costa had molested his two sons while they were at the Costa home. During cross-examination, Rok admitted that he had not obtained a telephone number to conduct a follow-up investigation, nor did he obtain an address. Tr. III, at 55-59.

Costa asserts that this exchange improperly permitted the jury to hear evidence of other uncharged crimes. The state court agreed that this portion of Rok's testimony was objectionable. The superior court panel explained that this error was not prejudicial because it could not conclude that there was a reasonable probability that the outcome would have been different if the testimony had been omitted. It

explained that Detective Rok's "insubstantial reference. . . to what was, essentially, an anonymous accusation," was outweighed by the "overwhelming evidence presented against appellant, including the victim's testimony and the medical evidence.1" Appendix at 67a.

Costa argues that the superior court's conclusion that appellate counsel's failure to preserve this issue on appeal was not prejudicial is unreasonable. The only inference that the jury could draw, in Costa's view, was that he "was a depraved character who was consequently more likely to have molested the victim." Dkt. no. 2, at 11.

The superior court did not "believe that Detective Rok's testimony expressly or by reasonable implication conveyed to the jury that [Costa] had in fact committed an unrelated criminal offense." Appendix at 66a I cannot join them in this evaluation of Rok's testimony. Undoubtedly this testimony is consistent with an inference that Costa had a propensity to commit the offenses for which he was charged. Yet superior court's conclusion that this inference was substantially outweighed by the testimony of the victim and the medical evidence is not unreasonable, particularly in light of Rhoades testimony when he was recalled to the stand, He testified that Detective Rok had been called by his brother and that he did not know what transpired during that call. Rhoades affirmed that there was no truth to the accusation that Costa had abused two of his sons, explaining that his sons had spent the night at Costa's house on many occasions and that he knew of no such incidents. Rhoades declared that, if he thought Costa had abused his children, he would not be testifying on Costa's behalf. Tr. III, at 75-77. a Commonwealth v. Morgan, 739 A.2d 1033, 1038 (Pa. 1999) (new trial warranted to afford defendant opportunity to present character witnesses without being cross-examined regarding alleged prior offenses of sexual abuse since prosecution relied on the credibility of the witnesses and there was neither medical evidence nor eyewitness testimony supporting the conviction).

E. Hearsay of Victim

Costa's next contention is that he was prejudiced by the admission of hearsay evidence during the direct examination of both the victim's mother and Detective Rok because certain testimony "only served to further bolster the alleged victim's credibility, which was the key issue in the case." Dkt. no. 2, at 18. Ms. Shultz testified about the relationship her son had with Costa's Son, the change in his behavior and what prompted her contact with the police. In explaining why she called the police, Ms. Shultz testified

> A. . . . He[GS,] was sitting in the spin chair, and he was deep in thought. He did not mention my name because I don't believe that he really meant to tell me because I think he was thinking out loud. He said, he's over there; Eddie's over there, and I'm afraid that Frank might try to make a move on him.
> Q. All right.
> A. Well, right away I just it just took me right off guard. And I looked at [him] and I said. . . why did you say that? And [he] just kind of snapped to, and it was liked [sic] it dawned on him that he had spoken out loud He got excessively defensive, very upset. And he goes, mommy, I'm not gay; don't call me gay.

Tr. II, at 19-20. Trial counsel failed to object to this testimony and appellate counsel failed to preserve the issue on appeal.

Detective Rok described his interviews with Ms. Shultz and her son. When asked what he did after the interviews, Rok responded: "Well, it - there was a detailed interview with the child, going into detail of multiple acts." Tr. II, at 64. After being cautioned by the prosecutor not to

relate what the child said, Rok explained that he determined that the matter "needed to be reported to Children and Youth Services and also that there should be a medical exam done upon the child for any physical evidence." Id. at 65. This testimony also came in without objection.

The PCRA court did not agree with Costa's assertion that this constituted hearsay offered solely to bolster the victim's credibility. It determined that the statements were not hearsay because they were offered to explain a course of conduct. Appendix at 63a. The superior court explained that Detective Rok's reference to "multiple acts" was not objectionable because it was not "overwhelmingly incriminating" in the absence of any description of the nature of the acts. Appendix at 65a. The statement neither detailed the acts nor identified Costa as the perpetrator. I conclude that these determinations were not an unreasonable application of Strickland.

The superior court also concluded that the statement by the victim's mother was not hearsay because it explained her course of conduct. Costa argues that Ms. Shultz could have simply indicated that she contacted the police based on information she received. To be sure, this would have been a better approach. Yet the victim himself testified at trial about his concern for Eddie. Tr. I, at 80, 89. While it may have been error by appellate counsel not to preserve this issue for appeal, the superior court's determination that this evidence was not prejudicial is not objectively unreasonable.

F. Prosecutorial Misconduct

Costa also contends that both trial counsel and appellate counsel were ineffective because they failed, respectively, to move for a mistrial based on the prosecutor's misconduct or to preserve this issue on appeal. This claim sounds in prosecutorial misconduct and "federal habeas relief may be granted when the prosecutorial misconduct may so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process." Werts, 228 F.3d

at 197 (quoting Greer v. Miller, 483 U.S. 756, 765 (1987) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974))) (internal quotation marks omitted). In Werts, the Third Circuit observed that "[i]n evaluating whether the remarks of the prosecutor rise to the level of a constitutional violation, we are required to examine those remarks in the context of the whole trial." Werts, 228 F.3d at 198 (citing Ramseur v. Beyer, 983 F.2d 1215, 1239 (3d Cir. 1992)). "The remarks must be sufficiently prejudicial in the context of the entire trial to violate the petitioner's due process rights." Werts, 228 F.3d at 198. The Werts panel instructed that

> in analyzing the effect of the prosecutor's remarks on the outcome of the trial, courts will consider the "invited response" or "invited reply" rule, i.e., whether "defense counsel's comments 'clearly invited the reply.'" . . . "[T]he Court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly." This analysis requires the reviewing court to weigh not only the impact of the prosecutors' remarks, but also to consider defense counsel's statement. If the prosecutor's comments were "invited," and went no further than required to "right the scale," such remarks would not warrant overturning a conviction.

Id. at 199 (citing United States v. Young, 470 U.S. 1, 12(1985)).

Pennsylvania law is consistent with this standard, requiring an evaluation of the context in which the misconduct occurred and granting a new trial "only in those instances where the language of the prosecutor is such that its 'unavoidable effect would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict.;" Commonwealth v. Novasak, 616 A.2d 477, 480 (Pa. Super. 1992) (quoting Commonwealth v. Johnson, 533 A.2d

994, 997 (Pa. 1987)). Accordingly, because Pennsylvania law is not contrary to the rule established by the Supreme Court, the question before me is whether the state appellate court unreasonably applied this law.

Here, Costa contends that the prosecutor's misconduct warrants habeas relief because the prosecutor made numerous improper remarks. The expression of the prosecutor's personal opinion about an aspect of the defense and his view of the weight to be accorded certain character testimony are two instances of alleged prosecutorial misconduct. Tr. III, at 105, 104. In addition, Costa argues that the prosecutor's closing argument provided the jury with an incorrect legal standard, stating that

> Now, you saw him and you heard [him]. You have. . . to decide whether, in fact, he is innocent. Whether he is in fact he has been brutally victimized, whether he has been raped and raped, sodomized, fondled, forced to perform oral sex, or you have to decide whether that child is a liar, who concocted, I think, some of the most horrendous and ruinous allegations imaginable.

Tr. III, at 94. This statement was preceded by argument, in Costa's view, which impermissibly appealed to the juror's emotions:

> The heart of this case is the testimony of [GS], the young child who is eleven years old. He sat there on the stand for over an hour, I believe for over an hour, under cross-examination by [Attorney] Abood, who cross-examined him in the great length, quite extensively. It was brutal, embarrassing, and demeaning. It's hard for an eleven year old boy to do. It's hard for an adult to do, let alone a child, to sit there and testify as to what he can only testify as to abominations.

Tr. III, at 93-94.

The first issue of prosecutorial misconduct that the superior court addressed was the prosecutor 's characterization of the defendant's theory of the case. During closing, the prosecutor argued:

> There's something I can only characterize as idiotic, the defendant offered that Bobby Williams concocted this and go [GSJ to concoct this because he [(Bobby Williams)] didn't get a car from the defendant. You can judge that as you will. I think that is asinine.

Tr. Ill, at 104. The appellate court concluded that the prosecutor's expression of personal opinion regarding this aspect of the defense was improper. It concluded, however, that that opinion did not destroy the jury's objectivity because Bobby Williams "did not provide any real damning evidence." The court explained that Williams neither witnessed the abuse nor testified to any sounds which would have been consistent with abuse. Appendix at 69a. Rather, he corroborated the fact that US was present in Costa's home on a number of occasions, including several overnight occasions, and that some of those instances would have afforded an opportunity for Costa to molest US.

The superior court next considered the prosecutor's personal opinion that the testimony of the defendant's character witnesses "didn't mean a hill of beans as far as I am concerned." Tr. Ill, at 105. The court concluded that the prosecutor "made that comment in response to a remark made by defense counsel during summation to bolster the character witness' credibility." Appendix at 71 a. Defense counsel had remarked during closing that defendant's character witnesses "were pretty good guys, some of the best, I would say. You can take them if you believe and use that alone to establish a reasonable doubt." Tr. III, at 91.

The superior court turned to Costa's contention that the prosecutor's closing argument was legally incorrect. The court looked to the context of the prosecutor's remarks, which were preceded by the statement:

> [Y]ou have to judge [US's] testimony as you would an adult, not encumbered by emotion, but you will have to agree with me that most children have a[n] innocent and trusting nature.

Id. at 94a. The court concluded, "[a]fter reviewing the entirety of the closing statement," that "the prosecutor referred not to innocence in the legal sense, but to innocence in the sense of naivete or susceptibility to exploitation." Appendix at 72a. The state court pointed out that the invitation to decide if the child's allegations were true was indelicate but a fair response to the defense comments that the child "fabricated these allegations or that he was urged to do so by others." Id. at 73a.

Finally, the state court summarily rejected the assertion that the prosecutor had improperly appealed to the sympathy of the jurors. Id.

I have considered the entire text of the closing arguments of both defense counsel and the prosecutor. I conclude that the thrust of the prosecutor's closing argument was predominantly a step-by-step review of the evidence supporting petitioner's guilt, and was not an improper invitation to render a verdict based on sympathy or retribution. Significantly, the prosecutor's evidentiary review was followed by the instruction from the court that it was the jury's duty to decide the case based on the evidence. Tr. III, at 125. Moreover, as the state appellate court noted, the jury was instructed that the prosecutor's comments were not evidence. Id. at 68a; Tr. III, at 125. In light of the compelling evidence supporting Costa's convictions, I conclude that state court's application of the law was not objectively unreasonable.

G. Cumulative Effect of Trial Counsel's Errors

Finally, Costa contends that the cumulative effect of counsel's errors was prejudicial. He asserts that the state court's refusal to consider the cumulative effect of these errors warrants granting habeas relief Appendix at 73a.

Ineffective assistance of counsel claims are governed by the standard set forth in Strickland, 466 U.S. at 690, 694. The holding in Strickland, however, does not clearly establish that a court must collectively consider the effect of counsel's deficiencies in determining if there would have been a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. That Strickland does not clearly establish whether a cumulative error analysis must be conducted is evident from the split among the circuits on this issue. In Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998), the Fourth Circuit rejected petitioner's argument that the cumulative effect of trial counsel's individual actions deprived him of a fair trial and joined the majority of its sister circuits, holding that "ineffective assistance of counsel claims, like claims of that court error, must be reviewed individually, rather than collectively[.]" Id.; see also Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996) (attorney's errors "that are not unconstitutional individually cannot be added together to create a constitutional violation"); Jones v. Stotts, 59 F.3d 143, 147 (10th Cir. 1995) ("cumulative error analysis" did not apply in the absence of error that was prejudicial under Strickland); United States v. Stewart, 20 F.3d 911, 917-18 (8th Cir. 1994). The Fifth Circuit agreed with this analysis in Livingston v. Johnson. 107 F.3d 297, 309 (5th Cir. 1997), concluding that the combined effect of counsels errors need not be evaluated because errors, which did not satisfy both prongs of the Strickland test, were not of a constitutional dimension. In contrast to these cases stand decisions by the Second, Seventh and Ninth Circuits which have acknowledged that a cumulative error analysis is appropriate under Strickland. See Harris by and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995);

Williams v. Washington, 59 F3d 673, 682 (7th Cir. 1995); Rodriguez v. Hoke, 928 F.2d 534, 538 (2d Cir. 1991) ("claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions"). Although the Third Circuit has not explicitly addressed the issue, it conducted a cumulative analysis of counsel's deficiencies which failed to independently satisfy both prongs of the Strickland test in Buehl v. Vaughn, 166 F.3d 163,180 (3d Cir. 1999) (concluding that overwhelming evidence of petitioner's guilt prevented him from satisfying the prejudice prong of Strickland).

Thus, the state court's refusal to conduct a cumulative error analysis does not contradict any principle established by the Supreme Court. Williams, 120 S.Ct. at 1523 (clearly established law "refers to the holdings, as opposed to the dicta"). While it may be that a cumulative analysis is consistent with Strickland, to obtain habeas relief on this basis requires that "the petitioner must demonstrate that Supreme Court precedent requires" that outcome. Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 888 (34 Cir. 1999) (en banc) "This standard precludes granting habeas relief solely on the basis of simple disagreement with a reasonable state court interpretation of the applicable precedent." Id. Costa has not satisfied this requirement.

Accordingly, I turn to whether the state court's refusal to conduct a cumulative error analysis is an unreasonable application of Strickland. In Williams, the Supreme Court declined to define "unreasonable application" by referring to a "reasonable jurist," explaining that a "federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case." 120 S.Ct. at 1521-22. The Third Circuit's analysis of this provision of the AEDPA in Matteo is in accord with the Williams' Court's reasoning. 171 F.3d at 889-90. In Matteo, the en bane Third Circuit observed that a "reasonable jurist approach" has a tendency to focus attention on the reasonableness of the jurists rather than the

merits of the decision itself." 171 F.3d at 889. The Matteo court cautioned, however, that "federal habeas courts are [not] precluded from considering the decisions of the inferior federal courts when evaluating whether the state court's application of the law was reasonable." Id. at 890.

Here, the existence of a circuit split on the necessity of conducting a cumulative error analysis supports the conclusion that the state court's refusal to engage in a cumulative error analysis was not unreasonable. Accordingly, I conclude that Costa's ineffectiveness claims do not warrant habeas relief because the state court's rulings were neither "contrary to" nor an "unreasonable application" of Supreme Court precedent.

H. Ineffective Assistance of Counsel with Respect to the Sentencing Phase

Costa was sentenced on March 21, 1994 to 10-20 years on the first count of involuntary deviate sexual intercourse (IDSI) committed in early December 1992. Tr. IV, at 83. A concurrent sentence of five to ten years was imposed on the second count of IDSI. Tr. IV at 85. Five to ten years consecutive to the second count of IDSI was imposed for the third IDSI offense, and the fourth count of IDSI garnered a five to ten year sentence concurrent with the sentence imposed on the first IDSI offense. The indecent assault and indecent exposure offenses received sentences of six to twenty-four months concurrent with the first IDSI offense. Two to four years incarceration, concurrent with the first IDSI offense, was imposed for the two counts of aggravated indecent assault. The seven charges of corruption of minors and the seven charges of endangering the welfare of children each netted a sentence of one to two years concurrent with the first IDSI offense. Tr. IV, at 82-89.

Prior to imposing the sentences on these thirty three offenses, the trial judge reviewed the factors he had considered, including "the information that (was] provided in the presentence report[.]" Tr. IV, at 79. He then advised Costa

that he was "going to be sentencing in the aggravated range on some of these cases, and I want you to understand my reasons." Tr. IV, at 80. He explained that the "victims, were particularly vulnerable, not only because of their age, but due to the circumstances, the circumstances under which they came under your care." Tr. IV, at 80. He further found

> that these are despicable crimes not only from the standpoint of the victim, not only from the standpoint of the crime committed, but due to the fact that I conclude that you were preying on vulnerable and weak people and in a situation in which you were, I believe, confident that they would not reveal these acts, both because of the embarrassment that would be attendant to them as well as the confidence which you gained from them or the things that you did and bought for them that would attempt to buy their trust.
>
> So these are the reasons that I feel that a sentence of total confinement is appropriate, and these are the reasons that, where I have sentenced you in the aggravated range, I feel those sentences are appropriate.

Tr. IV, at 81. The state judge explained prior to imposing the various sentences that he felt that if he "were to impose any lesser sentence, [he] would deprecate the seriousness of the offenses, and [he] would send an inappropriate message to the community." Tr. IV, at 82. He stated further that "[b]y sentencing you to anything less than what I intend to impose I feel would send a message to the community that we will not protect the vulnerable and the susceptible members of the community, those who can't protect themselves. And I feel that serious crimes, such as I conclude these are, deserve and merit serious penalties." Tr. IV, at 82.

After sentencing Costa on the thirty three counts, the sentencing judge noted that, with respect to the four counts

of IDSI, violating 18 Pa. C.S.A. § 3123, he was "imposing those sentences since they are mandatory sentences as well. I understand that 930-A, count one, exceeded the mandatory sentence, but the others are imposition of mandatory sentences. And minimum - mandatory minimum which I may impose on those and any other of these counts on which Mr. Costa was convicted of [IDSI] is a period of incarceration of five years." Tr. IV, at 89.

According to Costa, the sentencing court abused its discretion because the ten to twenty year sentence on the first count of IDSI "far exceeded the applicable guidelines and was twice the mandatory five year minimum sentence." Dkt. no. 2, at 19. The aggravated range, according to Costa, was 60-75 months. Id. at 22. He asserts that the sentencing court "repeatedly expressed its intention that the sentences would be within the aggravated range of the guidelines, but without explanation the court actually imposed a period of incarceration substantially above that range Certainly this was unfair and constitutes a violation of due process." Dkt. no. 19, at 20-21. Costa also contends that the failure of appellate counsel, who also represented Costa at sentencing, to raise this issue for review constitutes ineffective assistance.

The excessiveness or harshness of Costa's sentence does not raise a constitutional concern. Costa's sentence does not exceed the maximum term prescribed by statute. The sentence often to twenty years is consistent with § 1103(1) of Pennsylvania's Crime Code, which provides that a person convicted of IDSI, a felony of the first degree under 18 Pa. C.S.A. § 3123, "shall be sentenced to imprisonment. . . for a term. . . not more than 20 years." 1 8 Pa. CSA. § 1103(1). Rather, it is the adequacy of appellate counsel's representation that states a constitutional claim.

Although the Pennsylvania state courts have not addressed this issue on the merits, it may be considered here because there was an "absence of available State corrective process" when the state courts ruled on Costa's PCRA

petition, appeal and petition for allowance of appeal.[4] 28 U.S.C. § 2254(b)(1)(B)(i). Thus, I turn to whether Costa was deprived of his Sixth Amendment right to be afforded the effective assistance of counsel during the penalty phase.

Costa's ineffectiveness argument relies on Pennsylvania law which mandates that the sentencing court provide a contemporaneous statement of reasons for imposing a sentence outside of the guidelines, Commonwealth v. Guth, 735 A.2d 709, 711 (Pa. Super. 1999), and directs that a failure to provide the required statement of reasons "shall be grounds for vacating the sentence and resentencing the defendant." Commonwealth v. Gibson, 716 A.2d 1275, 1276-77 (Pa. Super 1998). In Commonwealth v. Rodda, 723 A.2d 212, 214 (Pa. Super. 1999) (en banc), the Superior Court instructed that the contemporaneous written statement of reasons mandated by the Sentencing Code requires, "at minimum, that when a court deviates from the sentencing guidelines, it must indicate that it understands the suggested sentencing range." The Rodda court rejected the concept that a "sentencing court must evoke 'magic words' in a verbatim recitation of the guidelines range to satisfy the mandate of the Sentencing Code[,]" id. at 215, holding instead that a sentence complies with the Sentencing Code "so long as the record demonstrates with clarity that the court considered the sentencing guidelines in a rational and systematic way and made a dispassionate decision to depart from them." Id. at 216. Where the trial court has indicated that it was imposing a sentence in the aggravated range and actually imposed a sentence which exceeded the aggravated guidelines, the Pennsylvania Superior Court has vacated the sentence and remanded the case for resentencing. Commonwealth v. Wagner, 702 A.2d 1084, 1086 (Pa. Super Ct 1997); Commonwealth v. Byrd, 657 A.2c1 9961, 964 (Pa. Super. Ct. 1995); Commonwealth v. Breter, 624 A.2d 661, 663 (Pa. Super Ct. 1993)

Relying on this jurisprudence, Costa argues that the representation of appellate counsel, who was also Costa's counsel at sentencing, fell below an objective standard of

reasonableness because the absence of any explanation for a sentence outside the sentencing guideline should have been raised on appeal and probably would have resulted in a remand for resentencing.

To be sure, the sentencing judge's statement of reasons more than justified the imposition of a ten to twenty year period of incarceration, outside the aggravated range of the guideline, on the first count of IDSI. It is also clear that the sentencing judge was aware that the sentence of ten to twenty years exceeded the five year statutory minimum which is applicable to an IDSI offense. Although the sentencing judge did not indicate on the record what the actual guideline range was in this case, his review of the factors considered in arriving at an appropriate sentence indicated his awareness of the contents of the presentence report and its guideline range. Tr. IV, at 79. Furthermore, the record demonstrates that the judge considered the appropriateness of sentencing Costa to a lesser term, but decided that a ten to twenty year sentence was warranted in light of the circumstances. See Tr. IV at 82, 89. Thus, Costa's counsel could have concluded that, notwithstanding the indication that Costa would be sentenced in the "aggravated range," the sentencing court's statement of reasons complied with Pennsylvania law which requires that a departure from the sentencing guideline be accompanied by some indication that the court had considered the guideline. Rodda, 723 A.2d at 215.

After consideration of these circumstances and given the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," Strickland, 466 U.S. at 689, it cannot be concluded that appellate counsel's performance "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. Because Costa has tailed to satisfy the first component of the Strickland test, his claim of ineffective assistance, at sentencing and on appeal of that sentence, cannot succeed.

V. Conclusion

Pennsylvania law with respect to ineffective assistance of counsel claims is not "contrary to" Supreme Court precedent. In concluding that the petitioner was not deprived of the effective assistance of counsel during the guilt phase of his trial, the state court's determination was not objectively "unreasonable" Thus, relief under 28 U. S.C. §225 4(d)(1) is not warranted. Relief under 28 U.S.C. § 2254(b)(l)(B)(i) is inappropriate as well in the absence of a showing that the performance of Costa's appellate counsel was deficient. Accordingly, this 9th day of January 2001, it is hereby

ORDERED AND DIRECTED that Frank Costa's petition for a writ of habeas corpus is DENIED. The Clerk shall mark this case closed.

BY THE COURT:

D. Brooks Smith
United States District Judge

cc: All counsel of record
Honorable Robert C. Mitchell

Footnotes

[1] "Tr-" refers to the transcripts of the state court trial and sentencing proceeding. Citation to "Tr. I" refers to testimony from November 16, 1993, the first day of trial. "Tr. II" and "Tr. III" reference testimony, respectively, from the second and third day of trial on November 17 and 18, 1993. The transcript from the sentencing on March 21, 1994 is cited as "Tr. IV."

[2] Costa also submits that Dr. Rosenberg impermissibly vouched for the victim's credibility by testifying that "(I) there was anal sexual abuse; 2) the child's symptoms were 'consistent and typical' with a child who has been sexually abused; and 3) the diagnosis was of the highest degree of

medical certainty" Dkt. no. 2, at 7. The superior court rejected this argument, relying on Commonwealth v. Hernandez, 615 A.2d 1337, 1343 (Pa. Super. 1992), which concluded that a medical expert in a sexual abuse case involving a child was not improperly bolstering the victim's credibility by testifying that the physical findings he observed were consistent with the allegation of rape. In short, the court drew a distinction between expert opinions based on physical findings versus expert opinions which relate to the general characteristics of child sexual abuse victims as they relate to reporting such abuse. Cf. Commonwealth v. Balodis, 747 A.2d 341, 343-44 (Pa. 2000) (ruling that testimony by social worker regarding delays in reporting details of abuse was impermissible because its sole purpose was to bolster child's credibility). Thus, the conclusion drawn by the PCRA court that counsel could not be deemed ineffective for failing to raise an objection to Dr. Rosenberg's testimony relating to the physical findings, see Petition for Allowance of Appeal, appendix at 58a (hereinafter cited as "Appendix"), was not unreasonable. Such objection would have been properly overruled.

[3] It should be emphasized, however, that the superior court also characterized Dr. Rosenberg's testimony as not offered solely to bolster the credibility of the victim. . . "Appendix at 57a. Indeed, the expert opinion was admitted to establish the actual occurrence of sexual abuse, consistent with the physical evidence, irrespective of the victim's credibility. As the magistrate judge noted, "the doctor was not commenting on the credibility of the victim or any other witness, but rather was stating his belief. . . regarding the fact that sexual molestation had occurred." Dkt. no. 7, at 7.

[4] Prior to 1999, PCRA courts refused, consistent with state law, to address discretionary sentencing issues contained in an ineffective assistance of counsel claim. Commonwealth v. Blackwell, 647 A.2d 915, 926 (Pa. Super. 1994) (discretionary aspects of sentence not subject to review under PCRA); Commonwealth v. Guerttner, 649 A.2d 139, 142 (Pa. Super. 1994) (sentencing issues may not be raised as ineffective assistance claims in a PCRA petition because it does not

pertain to truth determining processes). This practice was abrogated in Commonwealth v. Lantzy, 736 A.2d 564, 569 (Pa. 1999). There, the Pennsylvania Supreme Court recognized that issues relating to the penalty phase may be raised in the context of a PCRA petition. Id. (relying on Commonwealth v. Chester, 733 A.2d 1242, 1251 (Pa. 1999)).